

No. 12,492

IN THE
United States Court of Appeals
For the Ninth Circuit

STEPHEN W. GERBER,

Appellant

VS.

JACK E. MOLESWORTH,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This appeal involves an action for libel or defamation. The original complaint (Tr. 2-6) may be paraphrased as follows:

Appellee Jack E. Molesworth is a philatelic broker and stamp dealer of Boston, Massachusetts enjoying a good name and reputation. Appellant Stephen W. Gerber is the author of a column called "Pets and Peeves" in a weekly magazine known as "Weekly Philatelic Gossip". This magazine is sold and distributed throughout the United States to stamp collectors, auctioneers, and other persons interested in philately. In the October 30, 1948 issue of the mag-

azine Gerber wrote in his column a scurrilous and defamatory article, in which he referred repeatedly to Molesworth as a "mole" under the heading of "What is a Mole Worth?", and in which he charged him with a variety of improper trade practices, including the deliberate substitution of one stamp (No. 460) for another (No. 478) in a sale. The language employed was both vicious and intemperate. For example, Gerber stated that Molesworth would "chisel" on the lots he purchased by offering them for sale before paid for and suggested that "the mole's worth will have to be tested in a different racket".

Thereafter Molesworth filed a supplemental complaint (Tr. 9-11) in the same form as the original one setting forth a second article by Gerber which appeared in the March 5, 1949 issue of "Weekly Philatelic Gossip". This time Gerber directly named Molesworth, repeated the original charges, added a few more, and employed language even more derogatory than before. He also referred specifically to the first article by date, as well as the lawsuit based thereon. The complaint and supplement thereto stated that Gerber's charges were false in their entirety, exposed Molesworth to hatred, contempt, ridicule, and obliquy, and injured him in his business of philatelic broker and stamp dealer.

The District Court found the articles to be libelous *per se*, false and defamatory. The court also found them to have been published maliciously and without due and proper investigation, to the great and grievous damage of appellee (Tr. 17-22). Judgment was

entered accordingly in favor of Molesworth and against Gerber in the sum of three thousand dollars (\$3,000.00) general damages and seven thousand five hundred dollars (\$7,500.00) exemplary damages (Tr. 24-25).

STATEMENT OF FACTS.

Gerber's statement of the case (Br. 2-6) is incomplete and misleading. Appellee will endeavor to correct this by a brief statement of facts based on the record.

Stephen Gerber is a stamp expert with 40 years of experience and was the owner of a stamp business known as the National Stamp Company (Tr. 114). Jack E. Molesworth is a young man of 23 years of age (Tr. 34) who sold stamps since the age of 14 (Tr. 58) and who helped finance his way through Tulane University and the Harvard Business School by engaging in the stamp business (Tr. 34).

The source of Gerber's animus against Molesworth is easy to discover. On October 13, 1947 Gerber purchased from Molesworth a No. 478 United States stamp (Tr. 37; Pl. Ex. 1). Gerber returned the stamp on November 13, 1947, stating that "We are inclined to think" that the stamp was a No. 460 and therefore improperly classified (Tr. 38; Pl. Ex. 2). No. 478 is exactly the same stamp as No. 460 except that one is water marked and the other is not (Tr. 60). The error had been originally made by the well known Boston stamp firm of W. T. Pollitz & Bros. who had incorrectly described the stamp in their September

1947 catalogue (Tr. 41; Tr. 74-76; Pl. Ex. 12). W. T. Pollitz & Bros. acknowledged their error to Molesworth and explained the reasons therefor (Pl. Ex. 13). This information was transmitted by Molesworth to Gerber when the stamp was returned (Tr. 41-42). Gerber, in turn, referred to the explanation in his March 6, 1948 column in the "Weekly Philatelic Gossip" (Pl. Ex. 20). The incident was thus closed and *the business relationship between Gerber and Molesworth was entirely cordial.**

On March 17, 1948 Gerber sent Molesworth an auction circular of one of his sales (Tr. 39; Pl. Ex. 3). In response thereto Molesworth was the successful bidder on six of the lots advertised for sale (Tr. 39-40). Molesworth subsequently returned three of the lots as misdescribed (Tr. 40). Gerber thereupon became infuriated and proceeded to write Molesworth two heated letters on May 31, and July 28, 1948 (Tr. 40; Pl. Ex. 4, 6). *This was the source of Gerber's animus, and from this time on Gerber began to strike.*

Appellant tries to convey the impression at this point that he received gratuitous advice from various stamp dealers concerning Molesworth (Br. 3). This is not true. The fact is that Gerber himself began to hunt for ammunition to shoot at Molesworth. Gerber solicited information about Molesworth from two or three dealers only (Tr. 134). Arthur Margulies on September 13, 1948 replied that Molesworth's returns were "justified" in some instances (Def. Ex. D). M.

*Emphasis is the author's unless otherwise indicated.

Ohlman on October 19, 1948 replied that Molesworth was "technically right" on his returns (Def. Ex. E). Hy Bedrin on August 23, 1948 told about a single transaction he had had with Molesworth and added some hearsay information purporting to come from other unnamed dealers (Def. Ex. F). This was the same Hy Bedrin whom the American Stamp Dealers Association had previously reprimanded for the sale of improperly described stamps by him to Molesworth (Tr. 135-137; Dep. Bedrin 34-36).

Gerber also claims he talked to Larry Borenstein, Herman Hurst and Al Henry about Molesworth (Tr. 116). Gerber himself admitted that Hurst said "nothing derogatory except that that was the first time I found out that Molesworth was young. He told me he was just a young fellow, a midshipman in the Naval Reserve getting an education * * *" (Tr. 120). Borenstein merely said that Molesworth was an "impetuous kid" (Tr. 120-121). Al Henry did not talk to Gerber until *after* the publication of the first libel (Tr. 107). Gerber made no effort to make inquiries of the principal New York and Boston dealers with whom Molesworth did business (Tr. 132-133). He did not give Molesworth a chance to defend himself or produce evidence (Tr. 90). Gerber's whole attitude may be summed up in his following testimony:

"Q. Did you consider you were treating this young man fairly if you only wrote to two or three dealers out of 200 or 350 and then wrote this article?

A. Absolutely."

(Tr. 134.)

This was the state of the record on October 30, 1948 when Gerber wrote his first article in "Weekly Philatelic Gossip" reading as follows:

"What's A Mole Worth? Actually nothing, unless you skin it. The mole is a darn nuisance that burrows blindly and aimlessly until trapped. The philatelic species runs true to form as a bore and a nuisance. Sometime ago, he slipped the trap by disclaiming responsibility for substituting No. 460 for No. 478 in a sale. He professes to be a 'philatelic broker' who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that, 'His returns have always been late and excessive * * * If he doesn't sell them, he returns the stamps.' Another report tells us that, 'He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise.' Another auction house quotes their experience to the effect that the mole returned \$270 from a total of \$300, after holding the property between two and three months. He justified the delayed returns with the unreasonable claim that the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date. This type of operation is a new and clever angle: as long as it can be carried on. But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something."

(Pl. Ex. 7.)

We thus see that Gerber reverts to the No. 460-478 incident of August 13, 1947 on which he was fully informed and that he even misquotes the letters he had solicited.

Shocked by this vicious attack, Molesworth swallowed his pride and on November 8, 1948 wrote a letter to Gerber setting forth the facts about the charges Gerber had made. Concerning these charges Molesworth wrote:

“That our recent personal controversy motivated them, I have no doubt, but in spite of the personal contempt that you have for me, I still believe that you will have the decency to print a retraction if I can furnish proof that that which you have written is untrue * * * Will you favor me with a chance to disprove your accusations by furnishing me with your sources, so that I can send you the facts?”

(Pl. Ex. 8; Tr. 46-50.)

To this plea Gerber replied on November 19, 1948 as follows:

“My first inclination was to tear up your letter of November 8th because I am convinced that your impetuosity, lack of common sense and decency is such that you are one who will never admit to being wrong. * * *

Your letter indicts you just the same as your previous correspondence has * * *”

(Pl. Ex. 9; Tr. 50.)

Gerber wanted no facts. Encouraged by the first libel, he was determined, as he wrote his associate

Borenstein on February 20, 1949, to "beat Molesworth's brains out" and "to take another swipe at him in an early column" (Pl. Ex. 18). Sure enough, in the March 5, 1949 issue of "Weekly Philatelic Gossip" Gerber returned to the attack with unrestrained viciousness. He wrote:

"Gather Around, Dear Reader and enjoy the funniest story ever told. It furnishes proof positive that reporting stampic shenanigans is a risky vocation; especially, when a few gents are allergic to publicity. Pets and Peeves (October 30, 1948) published an item under the heading 'What's a Mole Worth?' Although no name was mentioned, a part-time Boston dealer named Jack E. Molesworth figured out that the shoe fit. So-o-o-, said J. E. M. has filed a libel action against us for a paltry \$150,000 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer. (Don't laugh yet.) If selling a counterfeit stamp, if misrepresenting a stamp cataloguing at \$40.00 as being one catalogued at \$55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.) We are reminded of one of several libel suits in recent years. A bozo sued Drew Pearson for libel. When the case was tried, Pearson proved the 'libel' and the bozo landed in the klink. When he saw the light, it was filtered through iron bars. We have two pertinent opinions, (1) this J.E.M. is being used as a tool to intimidate us in our fight for

decency in philately, (2) this J.E.M. won't dare to bring the case to trial."

(Pl. Ex. 10.)

These are the facts that impelled the trial judge at the conclusion of the case to state from the bench:

"I have read a lot of cases of libel and I never saw anything quite as bad as this. The character of the language, the utter arrogance of a man who sets himself up to be a judge of his fellow man, perhaps to ruin him by just a few words on some paper. It is unexplainable to me."

(Tr. 144.)

STATEMENT OF ARGUMENT.

We will now turn to the three specifications of error on which the appellant relies:

(1) THIRD PERSONS KNEW THAT THE FIRST LIBEL OF OCTOBER 30, 1948 REFERRED TO MOLESWORTH.

(a) This was apparent from the face of the libel itself.

On pages 7 to 12 of his brief Gerber argues that third persons did not know the first libel referred to Molesworth because he was not expressly named therein. It is elementary that a writing need not contain the *name* of the defamed person in order to constitute a libel. If the language used points a finger at the victim, that is enough.

Peterson v. Rasmussen, 47 Cal. App. 694, 698, 191 Pac. 30;

Vedovi v. Watson and Taylor, 104 Cal. App. 80, 83, 285 Pac. 418.

In this case the libel of October 30, 1948 left no room for doubt (Pl. Ex. 7). The victim's name is Molesworth. The libel was entitled "What's a Mole Worth?" and referred to the old No. 460-478 transaction which had been mentioned under Molesworth's full name in Gerber's column of March 6, 1948 (Pl. Ex. 20). The entire article was a play on the words "mole" and "worth". To remove all doubt, Gerber ended the article with the statement that "the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something" (Pl. Ex. 7). This last was a crude reference to Molesworth's employment by a Boston bank (Tr. 55).

Gerber says that the district court judge "conceded" that the first libel did not identify anyone (Br. 9). Reference to the transcript, however, shows that the trial court was not even considering at that point whether Molesworth's identity could be deduced from the article (Tr. 135). He was merely asking Gerber how he expected to correct abuses in the stamp business, his allegedly lofty purpose, when he failed to name the person charged.

The cases cited by appellant (Br. 7-11) are cases where the libel points the finger at *no one*. With these cases we have no quarrel. They are inapplicable here.

(b) **The second libel of March 5, 1949 removed any doubt as to the identity of the victim.**

Appellant's specification of error is rendered meaningless by reference to Gerber's second article of

March 5, 1949 (Pl. Ex. 10) where Gerber specifically referred to the first libel by date (October 30, 1948) and stated:

“Although no name was mentioned a part-time Boston dealer named Jack E. Molesworth figured the shoe fit.”

In this brazen manner, Gerber removed all possible doubt as to the identity of the victim.

Proof of the identity of the victim may be shown by a subsequent libel written by the author of the original libel.

16 *Cal. Jur.* 106;

Russell v. Kelly, 44 Cal. 641, 13 Am. Rep. 169.

(c) The second libel alone supports the judgment.

Even were we to ignore the first libel entirely, appellant would be in no better position. The supplemental complaint (Tr. 9-12) is based on the second libel of March 5, 1949 (Pl. Ex. 10). This libel specifically referred to Molesworth by name, and referred back to the first libel. It repeats and enlarges on the identical charges made in the original article. The two articles appeared in and were disseminated by the same column in the same publication. Therefore, the trial court's finding in respect to the second article (Tr. 22), fully supports the judgment.

(d) The evidence clearly shows that third persons understood the identity of the victim of the first libel.

In any event, the *evidence* itself shows that third persons knew the first libel referred to Molesworth.

Concerning the effect of the first libel, Molesworth testified as follows:

“Q. Now, at the close of the last session, Mr. Molesworth, you were testifying as to the effect of this first article in the Weekly Philatelic Gossip upon you. Were you finished with your answer?”

A. No, I was not.

Q. Will you finish, please?

A. To this time since the publication of this libel, I have been subjected to considerable ridicule and chiding and kidding by dealers around the country. I would enter an office and it would be ‘How’s the mole today?’ ‘What’s the mole worth?’ ”

(Tr. 44-45.)

To the same effect is the testimony of Joseph B. Abrams (Tr. 32). Appellant places a different construction on this testimony (Br. 11). We believe this construction is wholly unwarranted, but in view of the other evidence above referred to, it would serve no purpose to argue the matter further.

**(2) THE CHARGES MADE BY GERBER WERE FALSE
AND DEFAMATORY.**

On pages 12 to 17 of appellant’s brief, we find the astounding claim that the libelous charges were proved to be true. Gerber apparently relies on the rule of law that the defendant is only required to justify the “gist” or “sting” of the libel, and need not justify each and every word thereof. This is the

rule set forth in the cases cited on page 16 of appellant's brief. With these cases we have no quarrel. But appellant chooses to disregard completely the corollary to this rule, to-wit, *the justification must be co-extensive with the charge and must extend to every reasonable inference to be drawn from the libel.*

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This corollary is expressed by the very cases Gerber cites (Br. 16). For example, in *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 89 Pac. 1097, the California Supreme Court states the rule as follows:

“It is laid down that, in order to constitute a sufficient plea and justification, ‘the justification must always be as broad as the charge and of the very charge attempted to be justified.’ (Townsend on Libel and Slander, sec. 212.) This rule is too familiar to need further citation. While it is not necessary to justify every word of a defamatory charge, still the plea must meet the substantial imputation—the sting of the charge—as an ordinary reader of the article would understand it to have been made.”

(P. 25.)

The court in *Pyper v. Jennings*, 47 Cal. App. 623, 191 Pac. 565, stated the rule in this way:

“The general rule is that the plea and justification must be as broad as the charge, and, in point of law, must be identical with it.”

(P. 630.)

Let us therefore consider precisely what the “gist” or “sting” of the defamatory articles is.

- (a) The "gist" of Gerber's charges was that Molesworth is a deliberately dishonest and unethical stamp dealer.

The trial court found that Gerber's articles were libelous *per se* (Tr. 22).

See

California Civil Code, Sec. 45a.

This is apparent from an examination of the articles themselves. Thus in the article of October 30, 1948 (Pl. Ex. 7) Gerber charged:

"He professes to be a 'philatelic broker' who has apparently been carrying on his limited operations at the expense of the large stamp auction houses * * * He justified the delayed returns with the unreasonable claim that the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense; He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date * * * But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something."

Gerber's article of March 5, 1949 (Pl. Ex. 10) made the following charges:

"If selling a counterfeit stamp, if misrepresenting a stamp cataloguing at \$40.00 as being one catalogued at \$55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.)"

It is thus apparent that the “sting” or “gist” of these articles is not that Molesworth *innocently* misrepresented a particular stamp or *negligently* made late returns, as Gerber argues (Br. 12). The basic imputation is *deliberate misconduct and continued unethical trade practices by Molesworth*.

Gerber states that the trial court erroneously felt that defendant had to prove something more than truth (Br. 16-17). This is untrue. The court was properly interested in the “gist” or “sting” of the charges only. This is clearly shown by the following observations of the trial court:

“Maybe this man is not too competent as a stamp dealer. I don’t know, but that is not the question we have before us. * * *”

(Tr. 81.)

“It may be he made many common mistakes. That is beside the question. The question is whether or not there is any justification for these articles in the press. Every time these columnists don’t like somebody isn’t any excuse for their breaking forth with this sort of literature. I can’t try out whether or not this man, this plaintiff, is competent in the mind of someone else with respect to his identification of stamps.”

(Tr. 82.)

Now let us examine the truth or falsity of the “gist” of Gerber’s charges.

(b) The evidence shows that the charges made by Gerber are absolutely untrue.

It is elementary that the burden of proving the truth of the "gist" of the charges lies with defendant (*Dethlefsen v. Stull*, 86 Cal. App. (2d) 499, 506; 195 Pac. (2d) 56). The articles themselves must be considered in their entirety. They cannot be divided into segments and each portion treated as a separate unit (*Stevens v. Storke*, 191 Cal. 329, 334; 216 Pac. 371). They must be construed "as well from the expressions used, as from the whole scope and apparent object of the writer" (*Bates v. Campbell*, 213 Cal. 438, 441; 2 Pac. (2d) 383). They must be tested not only by the particular words used, but also by the natural and probable effect on the mind of the reader (*Bettner v. Holt*, 70 Cal. 270, 274, 275; 11 Pac. 713).

With these rules in mind, let us examine Gerber's charges:

The first charge is that a No. 460 stamp was sold for a No. 478 (Br. 12-14). We have already reviewed the circumstances of this innocent mistake. Gerber purchased the stamp from Molesworth on October 31, 1947 (Tr. 37; Pl. Ex. 1). He returned the stamp on November 13, with the statement that "we are inclined to think" it was a No. 460 and therefore improperly classified (Tr. 38; Pl. Ex. 2).

The two stamps were identical except that one was water-marked and the other was not (Tr. 60). Moles-

worth had previously purchased the stamp from the leading Boston firm of W. T. Pollitz & Bros. in September of 1947. Pollitz had incorrectly described the stamp (Tr. 41; Tr. 74-76; Pl. Ex. 12). Pollitz later apologized for the error and in explanation said:

“In this regard it is apropos to emphasize that the correct classification of the United States 1914-1915 and 1916-1917 issue is a difficult task to accomplish and that mistakes in such classification are quite common, especially when a stamp has been well hinged and the gum thereby disturbed as was the case in this instance.”

(Pl. Ex. 13.)

This information was transmitted by Molesworth to Gerber when the stamp was returned (Tr. 41-42). Gerber accepted the explanation and even referred to the same in his March 6, 1948 column (Pl. Ex. 20).

That the mistake was a natural one to make and innocent in its entirety is shown not only by the letter from Pollitz, but also by the following testimony of Molesworth:

“Q. Would it be easy or difficult to determine whether that stamp is water-marked?

A. It would depend on where the stamp was in the set. The catalog will show this particular stamp was very difficult to determine the water-mark, and in fact, I myself never did see a water-mark on it.

Q. Tell His Honor why it was difficult.

A. Sometimes, your Honor, a complete water-mark will show on a stamp. In other places in the set only a portion of the water-mark will

show on the stamp. One copy on a certain stamp may have a very obvious water-mark, and another copy may have one very difficult to detect. In this case the stamp had been placed in an album with a hinge on it, and it left a mark there which increased the difficulty of seeing the water-mark, especially if the stamp is under the hinge, which was the case in this instance.”

(Tr. 76-77.)

After the publication of the first libel, Molesworth again explained all of the circumstances to Gerber in his letter of November 8, 1948 (Pl. Ex. 8). Gerber, nevertheless, proceeded to repeat the same charge in his article of March 5, 1949, wherein he said that Molesworth “misrepresented a stamp cataloguing at \$40.00 as being one catalogued at \$55.00” (Pl. Ex. 10).

Thus, Gerber charged Molesworth with the *deliberate and premeditated* substitution of one stamp for another. That is the “gist” or “sting” of the charge. The evidence shows that the charge is false in its entirety.

The next charge which Gerber claims to be true is the accusation that Molesworth sold a “counterfeit” stamp (Br. 14-15). At the outset it should be made clear that the stamp in question was not a “counterfeit”. The stamp was a genuine Confederate stamp on which there was a fake cancellation (Tr. 53). Molesworth had consigned the stamp to one, Larry Boren-

stein, who sold it to John A. Fox, a leading dealer in Confederate stamps. There was some doubt as to the authenticity of the cancellation. Fox, therefore, bought the stamp with the express understanding that if it were not genuine it could be returned (Tr. 53, 65-66). Fox kept the stamp for five or six months and finally inserted it in one of his auction sales (Tr. 54). Molesworth had checked the authenticity of the stamp before it was sent to Borenstein by reference to Scott's United States Specialized Catalogue, which indicated that the cancellation was genuine (Tr. 63). Even though Mr. Fox, the authority on Confederate stamps, had himself failed to detect the error, and even though he had kept the stamp for over six months, Molesworth immediately refunded Fox's money when the mistake was called to his attention (Def. Ex. A). Molesworth at the time felt that he was entitled to some explanation from Fox concerning the delay. On March 2, 1949, Fox wrote a letter of apology to Molesworth in which he said that he had bought the stamp in Denver in the summer time and had put it away without bothering to check the same (Pl. Ex. 14). Finally, Fox himself states that all of his dealings with Molesworth were satisfactory in all respects (Pl. Ex. 15).

From the foregoing, it is clear that Gerber's charge that Molesworth deliberately and with premeditation sold a "counterfeit" stamp is false and defamatory.

Thirdly, Gerber charged that Molesworth's returns were late and excessive. He blithely dismisses these charges as non-libelous (Br. 15). Here again Gerber deliberately avoids the "sting" of the accusation. Naturally, the isolated statement that a stamp dealer bought \$300.00 worth of stamps and returned \$270.00 of them is inoffensive of itself. But let us see how Gerber treated this matter of returns.

In the article of October 30, 1948 (Pl. Ex. 7) Gerber said:

"He professes to be a 'philatelic broker' who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that, 'His returns have always been late and excessive * * * If he does not sell them he returns the stamps'. Another report tells us that 'He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise'. Another auction house quotes their experience to the effect that the mole returned \$270.00 from a total of \$300.00, after holding the property between two and three months. He justified the delayed return with the unreasonable claim that the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date."

In the article of March 5, 1949 (Pl. Ex. 10), Gerber said:

“If selling a counterfeit stamp, if misrepresenting a stamp catalogued at \$40.00 as being one catalogued at \$55.00, if unreasonable demands and claims, if *allegedly unsatisfactory auction settlements*—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.)”

We thus see that the “gist” or “sting” is that Molesworth deliberately and dishonestly took advantage of the auction houses by returning merchandise which he was unable to sell, and by returning an excessive amount of merchandise.

All of Gerber’s information, according to his own testimony, came from Hy Bedrin, Arthur Margulies, M. Ohlman, Al Henry, Larry Borenstein, and Herman Hurst (Tr. 134, 116). Molesworth bought \$351.50 worth of stamps from Bedrin and returned stamps in the sum of \$247.15. The returns were made within ten days after Molesworth actually received the same (Tr. 70). They were returned because they were misdescribed by Bedrin (Tr. 136). This is the same Hy Bedrin who had sold Molesworth other misdescribed stamps for which Bedrin was reprimanded by the American Stamp Dealers Association (Tr. 136; Dep. Bedrin 34-36). The only “late return” to Bedrin was the misdescribed lot Molesworth sent to the American Stamp Dealers Association, and which the association subsequently returned to Bedrin (Dep. Bedrin 40). It was impossible for Bedrin to know about the experiences of any other dealers with

Molesworth for the reason that he did not discuss Molesworth with any one, as he admitted in his deposition (Dep. Bedrin 30).

Arthur Margulies admitted that Molesworth's returns were "justified" (Def. Ex. D). Furthermore, a detailed analysis of all transactions between Margulies and Molesworth shows that Molesworth was prompt in his payments to him, and that a transaction between Margulies and Molesworth was pending at the time of trial (Tr. 141; Dep. Margulies 17-23).

Molesworth had two transactions with M. Ohlman. The first purchase was on May 7, 1948 for \$84.00, \$71.75 of which was retained and paid for within seven days thereafter (Tr. 140; Def. Ex. E). The second purchase was made on July 29, 1948 and was paid for within two days after purchase (Tr. 140). On August 19, 1948 Ohlman himself wrote Gerber that Molesworth was "technically right" on these returns (Tr. 140; Def. Ex. E).

We have already seen that neither Borenstein nor Hurst had made derogatory statements about Molesworth to Gerber (*Supra*, p. 5). As for Albert Henry, the San Francisco stamp dealer, it developed that he had one transaction only with Molesworth. On cross-examination he testified that a purchase was made from him on October 20, 1947 which was paid for by check on November 3, 1947 (Tr. 109).

Finally, Molesworth brought to the court room 14 letters from the leading auction houses in the United

States expressing satisfaction with the manner in which he did business (Tr. 49).

As the trial court stated, Gerber's articles are an example of one satisfying a personal peeve on the "sheerest hearsay" (Tr. 143). The "gist" of his charges was entirely false.

**(3) THE DAMAGES AWARDED BY THE TRIAL COURT ARE
FAIR AND REASONABLE.**

(a) **The award of \$3,000.00 general damages is extremely modest.**

The trial court called this a particularly aggravated case (Tr. 142-148). The language used was vicious and the charges struck at the very basis of Molesworth's business reputation. Nevertheless, Gerber, on pages 18-19 of his brief, claims that the evidence does not support the damages awarded.

Gerber forgets that the articles were libelous *per se*, and the trial court so found (Finding X, Tr. 22). Clearly, the charges had a natural tendency to expose Molesworth to hatred and contempt and to injure him in his business of philatelic broker (Cal. Civil Code, Sec. 45a).

Since the libels were defamatory on their face, they do not require proof of special damage. General damages are necessarily presumed, as the natural and probable consequence of the language used. The rule was thus expressed in *Jimeno v. Home Builders*, 47 Cal. App. 660; 191 Pac. 64, as follows:

“If, on its face, the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous *per se*, and special damages need not be alleged or proved. From such a publication the law presumes general damages as a natural and probable consequence.”

(Pp. 663-664.)

In this respect the law is fortunately realistic. When a man's business reputation is attacked by words libelous *per se*, he rarely, if ever, knows what particular persons refuse to do business with him thereafter. It is obvious that the language must have done damage in the natural course of events, and the injured party is not left without remedy.

In *Scott v. Times-Mirror Co.*, 181 Cal. 345, 184 Pac. 672, where there was an award of \$7,500.00 general damages and \$30,000.00 exemplary damages, the court said:

“The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel, or of what legal fees he has been deprived through its circulation, or what clients he has lost because of it. It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including the wide publicity

given to the libel, plaintiff's prominence in the community where he lives, his professional standing, his good name and reputation, his injured feelings and his mental suffering."

(p. 365.)

(b) The evidence itself supports the damages awarded.

Even though Molesworth was not required to prove the extent of the damages, under the foregoing rules, he nevertheless did so. The evidence showed that from the year 1946 until the publication of the articles in question, Molesworth had a steadily and rapidly increasing business. Thus in 1946 his gross business was \$5,000.00. In 1947 it exceeded \$15,000.00. In 1948 it was in excess of \$20,000.00. But during the first seven months of 1949 the volume fell off to \$11,000.00 (Tr. 35). Molesworth testified as follows:

"Q. Is it a general statement that the volume of business you have transacted in 1949 up to date is substantially the same or is it less in volume than in 1948?

A. It is slightly less in volume.

Q. And with the exception of that experience with this year, has your business been increasing or decreasing, an increasing or decreasing business?

A. My business was a rapidly expanding business prior to the publication of this article, no question.

* * * * *

Q. Your business was expanding? Let's put it this way: Your business was expanding up to the date of the publication of this first article, which

was in the latter part of October, or October 30, 1948, is that correct?

A. That is true."

(Tr. 35-36.)

Gerber does not deny this testimony. But he tries to escape the consequences by calling attention to the testimony of one of his witnesses, a Mr. Sankey, to the effect that stamp business in the West fell off in 1949 (Br. 19). But this same witness testified that he knew of no trade journals or authentic statistics on the subject (Tr. 99). Molesworth testified that the level of business depended upon the experience of the particular dealer (Tr. 66) and that Stanley Gibbons, one of the largest dealers in the United States, had personally told him that the volume for 1949 was higher than in 1948 (Tr. 67).

Certainly there is ample evidence of damage to Molesworth's business by reason of the libelous articles.

Another element of damages which the trial court undoubtedly considered was the effect of the libels on Molesworth's ability to purchase stamps.

Gerber's comments on the evidence pertaining to this subject are both inaccurate and misleading (Br. 19). He states that Joseph B. Abrams testified that there were 16 leading auction houses in the United States. Reference to the transcript shows that Abrams, in making a general description of the man-

ner in which the stamp business is conducted, stated that the ordinary method of selling stamps involving *the rich and valuable collections* is by auction sale. These auctions are held, for the most part, in New York City. The business is concentrated in the hands of perhaps a dozen large auction houses in New York City (Tr. 28-29). Abrams did *not* testify that these were the only auction houses in the United States. Gerber, himself, testified that there were possibly 350 auction houses in the United States (Tr. 134). Molesworth testified that he had 14 letters from the leading auctioneers expressing satisfaction with his manner of doing business (Tr. 49).

From the foregoing evidence, Gerber draws the unwarranted conclusion that Molesworth's ability to purchase stamps was not affected by the libels. A brief quotation from Molesworth's testimony will demonstrate the falsity of this conclusion:

“Q. What effect, if any, has this publication had on your stamp business?”

A. In the two months prior to the publication of this libel, my auction purchases amounted to \$3,200.00. After the publication of this libel, the last eight months, the total auction purchases were only \$6,000.00. I bid in approximately the same number of sales, same number of bids, approximately, and the same percentage of retail. I believe some of my bids were not recorded by virtue of that libel, and therefore I wasn't able to purchase the number of stamps I would have been able to purchase ordinarily. If I couldn't buy, I couldn't sell.”

(Tr. 45.)

Gerber tries to discredit Molesworth by calling him a "part-time" stamp dealer and calls particular attention to the fact that he is employed as an assistant credit manager in a bank (Br. 19). Let us examine the record on this point. At the time of trial Molesworth was 23 years old (Tr. 34). He had run his first national stamp ad in 1939 when he was but 14 years of age (Tr. 33). He was therefore engaged in the stamp business as a dealer for 10 years (Tr. 33). After his discharge from the Navy in 1946, he attended Tulane University with government assistance, and earned the balance of his living expenses by continuing in the stamp business (Tr. 34). At that time, Molesworth secured a \$2,000.00 G. I. loan from the Mercantile Bank and Trust Company of Kansas City, Missouri for the purpose of going into the stamp business, and a balance of \$1,000.00 remained due and owing thereon at time of trial (Tr. 35). He then attended the Harvard Business School for 16 months and continued in the stamp business as before (Tr. 34). Upon graduation from Harvard, he became manager of the credit department of the Rockland Atlas National Bank of Boston, Massachusetts (Tr. 34, 35). Thereafter he spent approximately 30 hours per week in the stamp business and 40 hours a week in his bank job (Tr. 34). In answer to the inquiry as to whether he intended to make the stamp business his full time occupation, Molesworth answered:

"It has been my intention for some years to eventually enter the stamp business on a full time

basis once I have acquired sufficient capital to do it in the manner in which I desire to do it.”

(Tr. 35.)

Another element of damages which Gerber chooses to disregard is the injury to Molesworth's feelings and reputation. The law does not require proof of this element of damages. The rule is stated in *Newby v. Times-Mirror Co.*, 46 Cal. App. 110; 188 Pac. 1008, as follows:

“But, to the complaint against the size of the verdict, there is still another answer, to wit: That, among the elements of actual damage which may be considered and made a part of the bases of the actual detriment suffered by the plaintiff from the publications, is not only the loss of reputation, but also the shame, the mortification and injury to feelings, etc., and of these elements it has been said: ‘While special damages must be alleged and proved, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence of actual proof; and to the amount that the jury estimates will fairly compensate plaintiff for the injury done.’ ”

(p. 132.)

As a matter of fact, evidence was introduced on this subject. Molesworth testified:

“Q. Tell us what effect the reading of the article had upon you.

A. The full impact of it was terrific upon me. In fact, I was terribly upset, especially by the

fact that the statements were completely untrue and had no foundation. Going further, I knew that this would have a drastic effect on my business, not only buying, but also selling stamps, especially the buying and selling of stamps through auctions, buy but can not sell——

Q. To sum up, what was your state of mind after you read this article there?

A. It made me highly nervous and also practically made me sick at the thought of what my parents would think, especially my mother, when she saw the article. She, my mother, is in very poor health, a very nervous person, and the shock of the article could be sufficient to kill her under proper circumstances.”

(Tr. 44.)

* * * * *

“Q. Now, at the close of the last session, Mr. Molesworth, you were testifying as to the effect of this first article in the Weekly Philatelic Gossip upon you. Were you finished with your answer?

A. No, I was not.

Q. Will you finish, please?

A. To this time since the publication of this libel, I have been subjected to considerable ridicule and chiding and kidding by dealers around the country. I would enter an office and it would be ‘How’s the mole today?’ ‘What’s the mole worth?’ References of that nature which naturally caused me bad feeling and mental tension.”

(Tr. 44-45.)

In the final analysis, there is an even more salient reason why the damages awarded are extremely rea-

sonable. The selling and buying of stamps is to a great extent, dependent upon the confidence in and integrity of the dealer. This is inherent in the nature of the stamp business, which was graphically explained by Mr. Abrams (Tr. 28-31). He summed up this basic fact as follows:

“In general, finishing up this aspect of the case, all I can say is that the stamp business is concentrated in the hands of a relatively few people, and the slightest breath of suspicion will affect any dealer and is enough to ruin him in the eyes of the few serious collectors in the stamp field.”

(Tr. 31.)

Sankey, one of Gerber's witnesses, also testified to the same effect:

“Q. Would you say, Mr. Sankey, that integrity is an important thing in the business of selling stamps?

A. I personally think it is an essential thing.

Q. Without confidence in the dealer, is it really impossible for the dealer to remain in business?

A. I would think so, yes.”

(Tr. 102-103.)

When we remember that approximately 15,000 copies of “Weekly Philatelic Gossip” are distributed throughout the United States (Tr. 84) and almost exclusively to stamp collectors, auctioneers and other persons interested in philately (Tr. 20) and that Gerber was a man of 40 years of experience in the stamp business who received fan mail from all over the coun-

try (Tr. 84), we can begin to appreciate the damage to Molesworth's reputation created by these libelous articles.

This Honorable Court has had occasion to consider the matter of damages in actions of this type. In *Liquid Veneer Corporation v. Smuckler*, 90 Fed. (2d) (C.C.A. 9th) 196, this court affirmed an award of \$11,000.00 general damages and \$9,000.00 punitive damages in a case based on a libelous letter sent by defendant to a customer of the manufacturer charging the plaintiff with dishonesty in trade practices and with manufacturing an infringing product. In many respects the language used was very mild in respect to Gerber's. This court stated:

“The jury allowed for loss of business \$11,000.00, and this court, under the Seventh Amendment to the Constitution, may not deprive appellee of the benefit of the verdict; the amount is in no sense unconscionable; and as the matter of exemplary damages was left entirely to the discretion of the jury, the court cannot invade the province of the jury and say that this amount, \$9,000.00, was excessive.”

(p. 205.)

(c) Molesworth is entitled to substantial exemplary damages.

Finally, we submit that this is a case wherein the award of \$7,500.00 punitive or exemplary damages was completely justified. There is no necessity to review the evidence in this regard. We have seen that Gerber's animosity arose out of a private quarrel

with Molesworth and that he published his first article without any investigation of the facts and with knowledge of their falsity. We have seen that Molesworth pleaded thereafter with Gerber to permit him to state his side of the controversy, but Gerber was not interested. Worse than that, Gerber continued his deliberate plan of character assassination by publishing a second and more scurrilous article which repeated and expanded upon the original charges. This is malice in a vicious and calculated form, and as applied to a young man on the threshold of his business career, it was base and contemptible.

The depth of Gerber's hatred against Molesworth was almost unbelievable. After the first libel had been written, Molesworth wrote to Gerber on November 8, 1948 pleading for the opportunity to provide Gerber with all of the facts of the case (Pl. Ex. 8). On November 19, 1948 Gerber flatly rejected the plea, hurled further invective on Molesworth, and said:

“Your letter *indicts* you just the same as your previous correspondence has.”

(Pl. Ex. 9.)

On February 20, 1949 Gerber wrote to his fellow columnist, Borenstein, stating:

“This kid is sticking his chin out a bit too hard. He is going to get clipped as he is locking horns with the wrong guy. * * * I hope he tries the suit. He'll get his brains beaten out. I am so 'scared' that I am taking another swipe at him in an early column.”

(Pl. Ex. 18.)

In this same letter, Gerber even took it upon himself to falsely charge that Molesworth was wearing a Navy uniform illegally. The second libelous article followed shortly thereafter (Pl. Ex. 10).

Nor was Gerber's maliciousness confined to Molesworth. Gerber was a person who debased the power of the press by using that power indiscriminately against anyone whom he disliked. He cared not about the damage to his victims. The malignancy in his heart was revealed by his own testimony from the witness stand, where he did not hesitate to hurl personal "indictments" against some of the leading stamp auction houses in the United States. Gerber said:

“Q. And did inquire of some of these leading concerns like Harmer, Rooke & Co., Jack Morrison, Inc.?”

A. They are not my ideas of leading concerns. I have indictments against both of them.

Q. You have?

A. I have indictments of my own against both of them.

Q. You have indictments?

A. That is what I said, yes, sir. I indict both of them.

Q. You mean mentally?

A. No, for their dealings on the record. I have made them the object of discussion, too.”

(Tr. 133-134.)

This then is a clear case where exemplary damages are both necessary and proper. In such a situation, the law is clear. *Meyers v. Berg*, 212 Cal. 415; 298 Pac. 806, stated the rule as follows:

“It is difficult to determine the proper amount of damages in an action of this character, and for this reason the law has wisely left it to the just discretion of the jury, and has given to them the right, upon proof that the defendant was guilty of malice, to give damages for the sake of example and by way of punishing the defendant. (Civ. Code, sec. 3294).”

(pp. 418-419.)

We respectfully submit that the judgment of the district court should be affirmed.

Dated, San Francisco, California,

August 7, 1950.

Respectfully submitted,

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